IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DANNY RAY WESTMORELAND

PLAINTIFF/APPELLANT,

VS.

SHRIKANT K. VAIDYA, M.D.

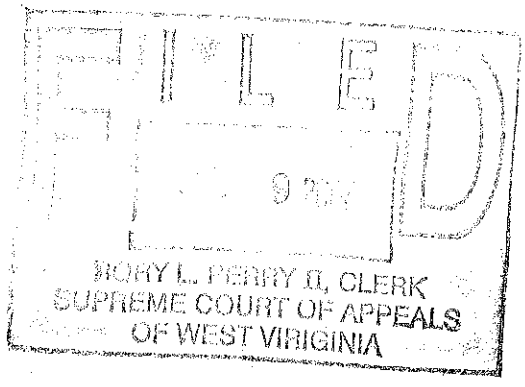
DEFENDANT/APPELLEE,

COURT OF APPEALS NO. 33459

APPEAL FROM MASON COUNTY
CIVIL ACTION NO. 05-C-97

MASON COUNTY CIRCUIT COURT
JUDGE TOD J. KAUFMAN

APPEAL BRIEF OF PLAINTIFF/APPELLANT DANNY RAY WESTMORELAND



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KIND OF PROCEEDING

This case was filed by Plaintiff/Appellant Westmoreland ("Westmoreland"), *pro se*, and included claims for medical malpractice, civil battery, fraud/falsifying medical records and slander against Defendant/Appellee Vaidya ("Vaidya").

NATURE OF THE RULING BY THE TRIAL COURT

The Trial Court dismissed *pro se* Plaintiff Westmoreland's **COMPLAINT** for Plaintiff's alleged failure to comply with the Certificate of Merit requirement of ***WV Code §55-7B-6*** of the ***Medical Professional Liability Act*** ("***MPLA***"). The Trial Court also denied Westmoreland's **MOTION FOR RECONSIDERATION AND FOR RELIEF FROM JUDGMENT UNDER CIVIL RULE 60** ("**MOTION FOR RELIEF**") which was filed by Robert W. Bright, Counsel for Westmoreland (retained after the dismissal).

STATEMENT OF THE FACTS OF THE CASE

This case has unique facts because it involves one Physician suing another Physician for medical malpractice as well as civil battery, slander and fraud. Danny Westmoreland, D.O., AOBFP, is a Board Certified Family Practicioner who is on staff at Pleasant Valley Hospital in Point Pleasant, West Virginia and at Holzer Medical Center in Gallipolis, Ohio. Shrikant K. Vaidya, M.D. is a urologist at Pleasant Valley Hospital. On or about June 13, 2003, Westmoreland went to the Emergency Room and Vaidya was assigned to perform a urological procedure to remove a kidney stone which was in Westmoreland's left ureter and had obstructed his left kidney. The procedure required that a stint be temporarily placed in Westmoreland's ureter. That procedure was conducted in the operating room under anesthesia and was uneventful.

When it was time for the stint to be removed, Westmoreland went back to Vaidya for the removal of the stint. The removal of a stint requires that a cystoscopy be performed and that procedure

normally takes less than one (1) minute. For billing purposes, Vaidya preferred to do the second procedure in his office without anesthesia. Westmoreland specifically requested that the procedure be done in the operating room under anesthesia. Vaidya refused to go to the operating room because he could not bill for the second procedure if it was done in the operating room within 30 days of the first procedure. At Vaidya's instruction, nurse Martha Bias (see statement in file) attempted to start IV anesthesia and was unsuccessful. Vaidya also made an attempt to start IV anesthesia, and was unsuccessful in his brief attempt. Vaidya was in a hurry and decided to perform the procedure without anesthesia - over Westmoreland's objections. Vaidya repeatedly assured Westmoreland that the removal of the stint would be a painless procedure and would be over in a matter of seconds. Vaidya also told Westmoreland to "quit being a baby".

Please note that in the course of his practice, Westmoreland has personally performed between 40 and 50 cystoscopies, and thus has an intimate knowledge with the normal procedures and practices involved therein.

During the removal of the stint, Westmoreland was lying on his back on a table. Westmoreland's wife Kim Westmoreland, R.N. and Vaidya's assistant were present as Vaidya began the procedure. Martha Bias was waiting right outside in the hallway.

Westmoreland alleges that within seconds of the beginning of the procedure, Vaidya was causing Westmoreland substantial pain and that Westmoreland again objected and withdrew his consent to the procedure by immediately demanding that Vaidya stop the procedure. Westmoreland also yelled for his wife to leave the room. Mrs. Westmoreland left and stood outside the door where she and Martha Bias could still hear her husband screaming in agony (See **AFFIDAVIT OF KIM WESTMORELAND** in the file).

Westmoreland alleges that he continued to object to the procedure, but at all times Vaidya refused to stop the procedure. Westmoreland attempted to get up off the table, but Vaidya instructed his assistant to lay on Westmoreland's chest so that Vaidya could continue the procedure. The procedure continued for 15 to 20 minutes until Vaidya finally terminated the procedure. Westmoreland alleges that Vaidya committed a battery by refusing to stop the procedure after Westmoreland had withdrawn his consent.

As a result of Vaidya's malpractice and/or battery, Westmoreland suffered and continues to suffer from Peyronie's disease, which is characterized by the formation of hardened tissue (fibrosis) in the penis that causes pain, curvature, and distortion, usually during erection. This disease causes sexual intercourse to be very painful and/or impossible. Further, Westmoreland lost approximately eighty (80) pounds and nearly died from renal failure as a result of Vaidya's actions. Even at present, Westmoreland can only urinate about once every three (3) days.

On or about May 2, 2005, Westmoreland, *pro se*, properly mailed a Notice of Claim and a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening Certificate of Merit as permitted in ***WV Code §55-7B-6(c)*** of the **Medical Professional Liability Act** ("***MPLA***"). Westmoreland also pursued obtaining a Certificate of Merit from approximately twelve (12) urologists. Two (2) of the urologists were willing to sign a Certificate of Merit - but only in exchange for a fee of forty thousand ($40,000.00) dollars. Therefore, Westmoreland, *pro se*, filed the **COMPLAINT** against Vaidya as a medical malpractice action, while also claiming civil battery under the theories of withdrawal of consent and "no means no".

Vaidya did not in any way respond within 30 days to Westmoreland's service of the above documents. Therefore, Westmoreland filed his Complaint on June 10, 2005 - approximately 45 days after he had served upon Vaidya the Notice of Claim and statement in lieu of Certificate of Merit. On

June 30, 2005, Vaidya moved the Court to dismiss Westmoreland's claims for failure to comply with the Certificate of Merit requirement of the ***MPLA***. Vaidya never filed an **ANSWER** to Westmoreland's **COMPLAINT**.

At no time in the underlying proceeding did Vaidya contest the validity or sufficiency of Westmoreland's statement in lieu of filing a certificate of merit. In his **MOTION TO DISMISS**, Vaidya merely argued that Westmoreland did not file a Certificate of Merit.

On July 11, 2005, Westmoreland, *pro se*, moved for default judgment against Vaidya in a document mis-titled **REGARDING SUMMARY JUDGMENT**. Westmoreland renewed that motion on July 18, 2005, August 26, 2005 and February 16, 2006. None of these motions for default judgment were addressed or ruled on by the Trial Court.

On October 30, 2006, the Trial Court dismissed all of Westmoreland's claims for failure to file a Certificate of Merit. Westmoreland then retained Counsel and filed his **MOTION FOR RECONSIDERATION AND FOR RELIEF FROM JUDGMENT UNDER CIVIL RULE 60** ("**MOTION FOR RELIEF**") on November 20, 2006. In that **MOTION FOR RELIEF**, Westmoreland referred the Trial Court's attention to this Court's recent opinions in ***Roy v. D'Amato***, ***Hinchman v. Gillette***, and ***Gray v. Mena*** as well as ***Cottrill v. Cottrill*** and ***Blair v. Maynard***. Nevertheless, on December 13, 2006, the Trial Court denied Westmoreland's **MOTION FOR RELIEF**.

ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL

1: THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING DEFENDANT/APPELLEE VAIDYA'S MOTION TO DISMISS *PRO SE* PLAINTIFF/APPELLANT WESTMORELAND'S COMPLAINT ON PURELY PROCEDURAL GROUNDS.

TRIAL COURT RESULT: The Trial Court dismissed *pro se* Westmoreland's **COMPLAINT** on purely procedural grounds.

2: THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT *PRO SE* PLAINTIFF/APPELLANT WESTMORELAND'S EXPRESS AND COMPLETE COMPLIANCE WITH THE EXCEPTION STATED IN ***WV CODE §55-7B-6(C)*** WAS NOT SUFFICIENT TO SATISFY THE REQUIREMENTS OF ***WV CODE §55-7B-6*** OF THE MEDICAL PROFESSIONAL LIABILITY ACT (***MPLA***).

TRIAL COURT RESULT: The Trial Court found that Westmoreland did not comply with the pre-suit filing requirements of the ***MPLA*** and granted Vaidya's MOTION TO DISMISS.

3: DEFENDANT/APPELLEE VAIDYA WAIVED ANY RIGHT TO OBJECT TO *PRO SE* PLAINTIFF/APPELLANT WESTMORELAND'S PRE-SUIT FILINGS BY FAILING TO GIVE WESTMORELAND WRITTEN AND SPECIFIC NOTICE OF THE ALLEGED DEFECTS AND INSUFFICIENCIES IN WESTMORELAND'S PRE-SUIT FILINGS WITHIN THIRTY (30) DAYS.

TRIAL COURT RESULT: The Trial Court granted Vaidya's MOTION TO DISMISS even though it was filed nearly two (2) months after Westmoreland's pre-suit filings were served upon Vaidya and twenty (20) days after Westmoreland's COMPLAINT was filed.

4: THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING DEFENDANT/APPELLEE'S VAIDYA'S MOTION TO DISMISS AND LATER DENYING PLAINTIFF/APPELLANT WESTMORELAND'S MOTION FOR RECONSIDERATION AND FOR RELIEF FROM JUDGMENT UNDER CIVIL RULE 60 BASED ON WESTMORELAND'S ALLEGED FAILURE TO COMPLY WITH THE REQUIREMENTS OF ***WV CODE §55-7B-6.***

TRIAL COURT RESULT: The Trial Court granted Vaidya's MOTION TO DISMISS and denied Westmoreland's subsequent MOTION FOR RELIEF.

5: THE TRIAL COURT ERRED BY IGNORING, NEVER RULING ON AND REFUSING TO GRANT PLAINTIFF/APPELLANT WESTMORELAND'S MOTION FOR DEFAULT JUDGMENT FOR APPROXIMATELY 18 MONTHS.

TRIAL COURT RESULT: The Trial Court ignored and never ruled on Plaintiff/Appellant Westmoreland's MOTION FOR DEFAULT JUDGMENT.

6: THE CERTIFICATE OF MERIT REQUIREMENT FOUND IN *WV CODE §55-7B-6(B)* OF THE MEDICAL PROFESSIONAL LIABILITY ACT (*MPLA*) IS UNCONSTITUTIONAL BECAUSE IT RESTRICTS OR DENIES CITIZENS' ACCESS TO THE COURTS BY REQUIRING PLAINTIFFS TO PAY EXORBITANT AMOUNTS OF MONEY IN ORDER TO OBTAIN A CERTIFICATE OF MERIT.

TRIAL COURT RESULT: The Trial Court (by implication) found that the Certificate of Merit requirement of the ***MPLA*** is constitutional.

7: THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF/APPELLANT WESTMORELAND'S CLAIM THAT DEFENDANT/APPELLEE VAIDYA COMMITTED A CIVIL BATTERY UPON WESTMORELAND WHICH WAS NOT GOVERNED BY THE *MPLA*. VAIDYA COMMITTED THAT BATTERY BY CONTINUING A MEDICAL PROCEDURE AFTER WESTMORELAND HAD WITHDRAWN HIS CONSENT TO THAT PROCEDURE.

TRIAL COURT RESULT: The Trial Court summarily dismissed all of Plaintiff/Appellant Westmoreland's claims.

8: THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF/APPELLANT WESTMORELAND'S CLAIMS FOR FRAUD AND SLANDER BECAUSE SUCH CLAIMS ARE NOT GOVERNED BY THE *MPLA*.

TRIAL COURT RESULT: The Trial Court summarily dismissed all of Plaintiff/Appellant Westmoreland's claims.

9: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT *PRO SE* PLAINTIFF/APPELLANT WESTMORELAND ACTED IN BAD FAITH IN HIS RELIANCE UPON THE EXCEPTION FOUND IN *WV CODE §55-7B-6(C)* OF THE *MPLA*.

TRIAL COURT RESULT: Trial Court found that Westmoreland acted in bad faith in his reliance upon the exception found in ***WV Code §55-7B-6(c)***.

POINTS AND AUTHORITIES RELIED UPON

CONSTITUTIONS

W. Va. Const. Art. III, § 17;
W. Va. Const. Art. VI, § 39;
Oklahoma Constitution Art. 5 § 46;
Oklahoma Constitution Art. 2, § 6;

STATUTES

W.V. Code §55-7B-6;
W.V. Code §55-7B-7;
W.V. Code § 55-2-18;

COURT RULES

W.V. Civil Rule 3;
W.V. Civil Rule 11;
W.V. Civil Rule 12;
W.V. Civil Rule 55;
W.V. Evidence Rule 702;
Arkansas Civil Rule 3;

WEST VIRGINIA CASE LAW

Bego v. Bego, 177 W.Va. 74, 76, 350 S.E.2d 701, 703-704 (1986);
Blair v. Maynard, 174 W.Va. 247, 252-253, 324 S.E.2d 391, 395-396;
Boggs v. Camden-Clark Memorial Hospital (2004), 216 W.Va. 656; 609 S.E.2d 917;
Cottrill v. Cottrill, 2006 W.Va. (32785);
Davey v. The Estate of Haggerty, 2006 W.Va. (32858);
Davis v. Mound View Health Care, Inc, 2006 WL 3257443 (W.Va. 2006);
Delapp v. Delapp, 213 W.Va. 757, 584 S.E.2d 899 (2003);
Foster v. Sakha (2001), 210 W.Va. 716; 559 S.E.2d 53;
Gilman v. Choi M.D. (1990), 185 W.Va. 177; 406 S.E.2d 200;
Gray v. Mena, 2005 W.Va. (32507);
Hinchman v. Gillette, et al., 2005 W.Va. (31760); 618 S.E.2d 387;
Kiser v. Caudill, 210 W.Va. 191; 557 S.E.2d 245 (2001);
Louk v. Cormier 2005 W.Va. (31773); 2005 WL 1545271;
Pethel v. McBride, 2006 W.Va (32784);
Roy v. D'Amato, 2006 W.Va. (32853);

CASE LAW FROM OTHER STATES

VIRGINIA

Pugsley v. Privette, 220 Va. 892, 263 S.E.2d 69 (1980);
Washburn v. Klara, 263 Va. 586, 590, 561 S.E.2d 682, 685 (2002);
Woodbury v. Courtney, 239 Va. 651, 391 S.E.2d 293 (1990);

OKLAHOMA

Zeier v. Zimmer, Inc. (2006), 2006 OK 98, 152 P.3d 861, Case Number: 102472;

ARKANSAS

Summerville v. Dr. Thrower (2007), Opinion No. 06-501, Opinion Delivered 3-15-07;
Weidrick v. Arnold, 310 Ark. 138, 835 S.W.2d 843 (1992);

KENTUCKY

Andrew v. Begley, 2006 S.W.3d (2005-CA-000273-MR);
Coulter v. Thomas, 33 S.W.3d 522 (2000);
Hoofnel v. Segal, 2003-CA-000412-MR (2003 Kentucky Court of Appeals);
Vitale v. Henchey, 24 S.W.3d 651(2000);

GEORGIA

Mims v. Boland, 110 Ga.App. 477;

ILLINOIS

Cohen v. Smith, 269 Ill. App. 3d 1087, 648 N.E.2d 329 (1995);
Grant v. Petroff, 5-96-0396 (Illinois Fifth District Court of Appeals, 1996);

WISCONSIN

Schrieber v. Physician's Insurance Company of Wisconsin 217 Wis.2d 94; 579 N.W.2d 730(1999).

ARGUMENT ON ASSIGNMENTS OF ERROR

1: THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING DEFENDANT/APPELLEE VAIDYA'S MOTION TO DISMISS *PRO SE* PLAINTIFF/APPELLANT WESTMORELAND'S COMPLAINT ON PURELY PROCEDURAL GROUNDS.

Westmoreland represented himself in the case below until after the Trial Court dismissed his **COMPLAINT** on October 30, 2006. The Trial Court's dismissal of Westmoreland's **COMPLAINT** was entirely based on Westmoreland's alleged non-compliance with the requirements of the ***MPLA*** by failing to file a Certificate of Merit. However, Westmoreland was relying on the exception found in ***WV Code §55-7B-6(c)*** and as required by the exception, Westmoreland did timely file a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening

Certificate of Merit. Vaidya did not timely respond in writing to Westmoreland's pre-suit filings nor did Vaidya at any time object to the sufficiency of Westmoreland's screening Certificate of Merit.

This Court has recently again affirmed that a *pro se* party is less responsible to follow the procedural and evidentiary rules than is a represented party. Further, this Court held that a Trial Court should "strive to ensure" that a *pro se* litigant not have their claims dismissed merely on procedural grounds.

In ***Cottrill v. Cottrill***, 2006 W.Va. (32785), a case involving a *pro se* litigant seeking elimination of past child support obligations, the West Virginia Supreme Court stated in the first paragraph under the heading, **III. DISCUSSION** (emphasis added),

> . . . we have recognized that a pro se litigant's other rights under the law should not be abridged simply because he or she is unfamiliar with legal procedures. To that end, we have advised that "**the trial court must 'strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules.'**" ***Bego v. Bego***, 177 W.Va. 74, 76, 350 S.E.2d 701, 703-704 (1986) (citing ***Blair v. Maynard***, 174 W.Va. 247, 252-253, 324 S.E.2d 391, 395-396).

The ***Cottrill*** Court also stated the following two (2) paragraphs before the **CONCLUSION**, quoting from ***Blair v. Maynard*** (emphasis added),

> The court must not overlook the rules to the prejudice of any party. **The court should strive, however, to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake.** Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not.

Undoubtedly, the Trial Court's dismissal of the Westmoreland's claims has caused the forfeiture of his substantial rights - even though it is clear from the facts that Westmoreland made a good faith effort to comply with ***WV Code §55-7B-6*** as he understood it (see discussion below). Therefore, the Trial Court abused its discretion by dismissing Westmoreland's claims and by denying Westmoreland's **MOTION FOR RECONSIDERATION AND FOR RELIEF FROM JUDGMENT UNDER CIVIL RULE 60.**

2: THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT *PRO SE* PLAINTIFF WESTMORELAND'S EXPRESS AND COMPLETE COMPLIANCE WITH THE EXCEPTION STATED IN WV CODE §55-7B-6(C) WAS NOT SUFFICIENT TO SATISFY THE REQUIREMENTS OF WV CODE §55-7B-6 OF THE MEDICAL PROFESSIONAL LIABILITY ACT (*MPLA*).

Westmoreland, *pro se,* filed this action as a medical malpractice action, but he did not file a Certificate of Merit for two (2) reasons - (1) Westmoreland's good faith reliance on ***W.V. Code §55-7B-6(c)*** and (2) the exorbitant expense of obtaining such a Certificate of Merit from the urologists who were willing to sign such a Certificate of Merit.

It is undisputed that Westmoreland, *pro se,* properly and timely served a **NOTICE OF CLAIM** upon Vaidya. It is also undisputed that Westmoreland also served upon Vaidya a statement specifically setting forth the basis of the alleged liability of Vaidya in lieu of serving a screening Certificate of Merit as is permitted/required by ***WV Code §55-7B-6(c)*** of the ***MPLA***. Westmoreland believed that his cause of action was based upon a well-established legal theory of liability - civil battery - which did not require expert testimony supporting a breach of the applicable standard of care. Because of his good faith belief, Westmoreland thereby fully complied with the initial service requirements of ***WV Code §55-7B-6.***

Vaidya's argument in his **MOTION TO DISMISS** and the Trial Court's subsequent dismissal of Westmoreland's claims are based entirely on the fact that Westmoreland did not serve a Certificate of Merit upon Vaidya. The Trial Court dismissed Westmoreland's claims shortly after a hearing on the issue. The Trial Court issued no warning of impending dismissal to Westmoreland, nor provided him with additional time to comply with the Trial Court's interpretation of the ***MPLA*** (as this Court required in ***Gray v. Mena***, discussed below).

The exception to the certificate of merit requirement which Westmoreland relied upon is found in ***W.V. Code § 55-7B-6(c)*** and states (emphasis added),

> **Notwithstanding any provision of this code**, if a claimant or his or her counsel, **believes** that no screening certificate of merit is necessary because the cause of action is based upon a **well-established legal theory of liability which does not require expert testimony** supporting a breach of the applicable standard of care, the claimant or his or her counsel, shall file a statement specifically setting forth the basis of the alleged liability of the health care provider **in lieu of a screening certificate of merit**.

Vaidya has alleged that Westmoreland did not comply with the requirements of in ***W.V. Code § 55-7B-6(b)***. However, the exception in ***W.V. Code § 55-7B-6(c)*** clearly states that it exists outside the requirements of ***W.V. Code § 55-7B-6(b)*** by stating, "Notwithstanding any provision of this code. . .".

Therefore, under a plain reading of ***W.V. Code § 55-7B-6(c)***, it was possible for Westmoreland to fully comply with the requirements of ***W.V. Code § 55-7B-6*** without filing a certificate of merit and Westmoreland asserts that he did completely and entirely comply with those requirements.

It appears that this Court has never directly addressed nor clearly defined the bounds of ***W.V. Code § 55-7B-6(c)***. However, there is a brief mention of ***W.V. Code § 55-7B-6(c)*** in ***Davis v. Mound View Health Care, Inc***, 2006 WL 3257443 (W.Va. 2006), where this Court acknowledged that the exception exists and stated, "It is also undisputed that Appellant did not serve a notice of claim together with a statement invoking the provisions of W. Va. Code § 55-7B-6 (c) indicating that a screening certificate of merit was not required to establish liability . . ."

The Legislature created the exception in ***W.V. Code § 55-7B-6(c)*** with the intent that the exception apply to at least some medical malpractice claims. Courts in other jurisdictions (at least Virginia and Kentucky, see **ASSIGNMENT OF ERROR NO. 7**) have found that expert medical testimony is not necessary in battery/lack of consent cases against physicians.

In order to resolve the dispute regarding Westmoreland's compliance or lack thereof, it is useful to break down the statute and determine what the exception actually required of Westmoreland.

First, Westmoreland must have **believed** that **no screening Certificate of Merit was necessary**. Westmoreland previously submitted a sworn affidavit stating that he believed that a Certificate of Merit was not required. Vaidya has never presented any evidence to prove that Westmoreland believed otherwise.

Second, Westmoreland must have **believed** a Certificate of Merit was not required **because** his cause of action was **based upon a well-established legal theory of liability** which did **not require expert testimony**.

Westmoreland, *pro se*, clearly and repeatedly alleged that "no means no" and that his claim rested primarily on battery because he withdrew his consent to the procedure mere seconds after it had begun (and, in fact, Westmoreland had objected to the procedure being done without anesthesia before it even began). It is beyond dispute that battery is a well established legal theory of liability - it is doubtful that even the Defendant would argue that expert testimony is necessary in order to prove that a civil battery has occurred. In fact, the West Virginia Supreme Court has held as much in ***Boggs v. Camden-Clark Memorial Hospital*** (2004), 216 W.Va. 656; 609 S.E.2d 917. Further, it is well established in the Courts that a doctor has committed a battery if he performs a medical procedure without the consent of the patient.

Third, Westmoreland must have **filed a statement** specifically setting forth the **basis** of the **alleged liability** of the health care provider **in lieu of a screening certificate of merit**. Westmoreland, *pro se*, did timely file Notice of Claim and a statement which satisfied the above criteria. There is no mention of "bad faith" or "lack of good faith" in ***W.V. Code § 55-7B-6***.

Therefore, Westmoreland, *pro se*, met the initial requirements of ***W.V. Code § 55-7B-6*** and was not required to initially file a certificate of merit. It is undisputed that Vaidya did not timely respond to Westmoreland's pre-suit filings.

In ***Gray v. Mena***, 2005 W.Va. (32507), Ms. Gray filed a claim against Dr. Mena alleging that Dr. Mena had physically assaulted and battered Gray. The basis of Ms. Gray's case was that without her consent, Dr. Mena moved her underclothing and inserted a non-gloved finger into her vagina. Ms. Gray contended that the insertion of the doctor's finger was not medically necessary and constituted an assault and battery.

The Circuit Court of Mercer County dismissed Gray's complaint because the Court found that Gray's claims were subject to the requirements of the Medical Professional Liability Act ("***MPLA***") at ***W.V. Code § 55-7B-6(b)*** and that Gray did not fulfill those requirements.

In ***Gray***, this Court reversed the decision of the Circuit Court of Mercer County and stated on page 5 of the opinion (emphasis added),

> We recognize that in the case sub judice, **a good faith argument may be made that a claim of assault and battery is clearly a claim of an intentional tort which did not involve health care services rendered or which should have been rendered. . .**
>
> (page 10). . . under the particular circumstances of this case, **dismissal appears to be a disproportionately harsh sanction.** Given the newness of the statute and the approach taken by the Florida courts, as reviewed above, **we do not believe that the Appellant's case should have been dismissed.** We find that the Appellant and her counsel, in good faith, made a legitimate judgment that this case should be framed as an assault and battery civil action, rather than a medical malpractice action. The Appellant therefore filed her civil action without adherence to **West Virginia Code § 55-7B-6. In this situation, the defendants should be permitted to request compliance with the statutory requirements.** The lower court should thereafter examine the issues raised by the defendants and require the Appellant to comply with the statute. The statute of limitations for bringing an action under West Virginia Code § 55-7B-6 should be tolled during this court assessment, and **the Appellant should be provided with an additional thirty days after the court decision to comply with the provisions of the statute.**

As was noted in ***Gray***, *supra*, the ***MPLA*** is a relatively new statutory construction and is still being interpreted by the Courts. The record here reveals that Westmoreland totally and completely complied with the notice of claim requirement of the ***MPLA***. Westmoreland mailed the notice of claim

to Vaidya and Westmoreland waited - not 30 days as the Act requires - but 45 days prior to filing his **COMPLAINT**. Vaidya has presented no evidence to contradict Westmoreland's claim that he did not file a Certificate of Merit based on the two (2) reasons stated above. On the other hand, Westmoreland did present significant evidence that he made a good faith effort to obtain a Certificate of Merit by contacting approximately twelve (12) urology specialists - nearly all of the urology specialists in the State of West Virginia.

Dr. Westmoreland has performed 40 to 50 cystoscopies in the course of his family practice. Westmoreland asserts that he has more than a casual familiarity with the standard of care related to performing a cystoscopy, and for that reason alone, his pre-suit filings were sufficient to satisfy the requirements of the ***MPLA***. Westmoreland's allegation that Vaidya breached the standard of care was sufficient to qualify as expert testimony - even Vaidya has admitted as much (see below) - and therefore, as a Board Certified Physician, Westmoreland's allegations were the substantial equivalent of a Certificate of Merit because Westmoreland is an expert as relates to cystoscopies.

Vaidya was aware of Westmoreland's experience performing cystoscopies as the two (2) Physicians had been friends for a number of years prior to Vaidya's tortious conduct. Vaidya's awareness of Westmoreland's expertise is evident from Vaidya's own **DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND RELIEF**. In that motion, Vaidya stated on page 8 (emphasis added),

> [Evidence] Rule 702 suggests that **Plaintiff's complaint** itself, in which Plaintiff stated that he did not need expert testimony to support his claim, **was itself an assertion of expert opinion** because **Plaintiff relied on his own knowledge, skill, experience, training and education as a medical doctor** to formulate the opinions and conclusions he asserted. In particular, Plaintiff opined that Dr. Vaidya "did permanent structural damage" to Plaintiff and that Dr. Vaidya should "immediately discontinue your method of office cystoscopy due to the level of damage to others. . . **These are clearly expert opinions under Rule 702.**

Vaidya has admitted that Westmoreland is an expert - thus, even the Defendant has stated that Westmoreland is qualified to give an expert opinion in this case. As such, Westmoreland did substantially comply with the Certificate of Merit requirement by filing his statement in lieu of Certificate of Merit. His expertise in regards to cystoscopy causes his statement in lieu of certificate of merit to qualify as expert opinion evidencing a breach of the standard of care by Vaidya.

Even though Vaidya admits that Westmoreland was an expert qualified to testify as to the standard of care related to a cystoscopy, Vaidya refused to respond to Westmoreland's pre-suit filings.

Westmoreland, *pro se*, was familiar with ***W. V. Code §55-7B-7*** which states in part that an expert must have ". . . devoted, at the time of the medical injury, sixty percent of his or her professional time annually to the active clinical practice in his or her medical field or specialty. . ." in order to be qualified as an expert. As a result of Westmoreland's lay person's understanding of ***W. V. Code § 55-7B-7***, he believed that he must have obtained a Certificate of Merit from a specialist in urology. Therefore, Westmoreland did not pursue obtaining a Certificate of Merit from a Physician who was not a specialist in urology and he did not file a document titled "Certificate of Merit" and sign it himself.

However, this Court held on page 14 of the opinion in ***Louk v. Cormier, M.D.*** 2005 W.Va. (31773); 2005 WL 1545271,

> ***W. Va. R. Evid. 702*** does not provide that the legislature may outline when a witness should be found to be qualified as an expert. This Court has complete authority to determine an expert's qualifications pursuant to its constitutional rule-making authority. . . .
>
> Accordingly, we hold that ***Rule 702*** of the West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion.

Further, in ***Kiser v. Caudill***, (2001), 210 W.Va. 191557; S.E.2d 245, this Court stated at page 5 of the opinion,

> [a] medical expert, otherwise qualified, is not barred from testifying merely because he or she is not engaged in practice as a specialist in the field about which his or her testimony is offered . . . [T]o qualify a witness as an expert on that standard of care, the party offering the witness must establish that the witness has more than a casual familiarity with the standard of care and treatment commonly practiced by physicians engaged in the defendant's specialty.

This Court also stated in ***Gilman v. Choi, M.D.*** (1990), 185 W.Va. 177; 406 S.E.2d 200 at page 181, ". . . there are circumstances in which, for example, a generalist may testify as to the standard of care of a defendant specialist . . ."

In light of this Court's holdings in the above cases, any Physician with more than a casual familiarity with the standard of care related to performing a cystoscopy would be an expert for purposes of a Certificate of Merit and for purposes of testimony. Therefore, Westmoreland's filings with the Court are sufficient to fulfill the Certificate of Merit requirement of the ***MPLA***.

3: DEFENDANT/APPELLEE VAIDYA WAIVED ANY RIGHT TO OBJECT TO *PRO SE* PLAINTIFF/APPELLANT WESTMORELAND'S PRE-SUIT FILINGS BY FAILING TO GIVE WESTMORELAND WRITTEN AND SPECIFIC NOTICE OF THE ALLEGED DEFECTS AND INSUFFICIENCIES IN WESTMORELAND'S PRE-SUIT FILINGS WITHIN THIRTY (30) DAYS.

Under the ***MPLA***, once Westmoreland had fulfilled his initial responsibility under ***W. V. Code §55-7B-6*** by filing the Notice of Claim and statement setting forth the basis of alleged liability, Vaidya was required by the statute to respond in writing within 30 days in order to express any objections to the insufficiency of Westmoreland's Notice of Claim and/or his statement filed in lieu of the certificate of merit. Rather than complying with the statute and responding in order to inform Westmoreland of the alleged insufficiency in the pre-suit filings, Vaidya chose to ignore Westmoreland's filings. Further, Vaidya did not file his **ANSWER** within 20 days of the filing of Westmoreland's **COMPLAINT** as is required by the ***Civil Rules***.

There is no evidence in the record that Vaidya responded in writing within 30 days of service of the Notice of Claim and statement in lieu of Certificate of Merit as is required by ***W.V. Code §55-7B-6 (e)***. Therefore, Vaidya **waived** all objections regarding the alleged insufficiencies of the Notice of Claim and Certificate of Merit and Vaidya's **MOTION TO DISMISS** Westmoreland's **COMPLAINT** should have been denied.

By choosing not to comply with the requirements of the ***MPLA***, Vaidya **waived** his objection to the certificate of merit requirement.

After Westmoreland's pre-suit filings - and prior to the filing of Westmoreland's **COMPLAINT** - Vaidya could have argued that Westmoreland's pre-suit filings upon Vaidya would not have been sufficient to fulfill the requirements of the ***MPLA***. However, Vaidya chose to ignore Westmoreland's pre-suit filings in contravention of the responsibility placed upon Vaidya by the ***MPLA*** to object to such insufficiencies - **in writing - within 30 days** - in order that Westmoreland may be put on notice of the insufficiencies and be given an opportunity to address and correct the alleged insufficiencies. Vaidya failed to do so and thereby waived any objection to Westmoreland's pre-suit filings.

The Supreme Court interpreted the ***MPLA*** in ***Roy v. D'Amato***, 2006 W.Va. (32853) and ***Hinchman v. Gillette, et al.***, 2005 W.Va. (31760); 618 S.E.2d 387 - both cases procedurally similar to Westmoreland's here. In ***Roy***, the Plaintiff filed a medical malpractice action without giving the Defendant the notice required by the Act. The Randolph County Circuit Court dismissed the Plaintiff's case for failure to comply with the requirements of the ***MPLA***.

The Supreme Court of West Virginia reversed the decision of the Trial Court and referred back to the ***Hinchman*** case, which involved both a deficient notice of claim and a deficient certificate of merit. The ***Roy*** Court stated at page 8 of the opinion (emphasis added),

> In order to fulfill the statutory purposes, **we concluded that any objections to a pre-suit notice and screening certificate should be made prior to the filing of the complaint so that the plaintiff may have the opportunity to correct the alleged defects and insufficiencies.**
>
> Accordingly, we held in Syllabus Points 3 and 4, respectively, of ***Hinchman***, that,
>
> > Before a defendant in a lawsuit against a healthcare provider can challenge the legal sufficiency of a plaintiff's pre-suit notice of claim or screening certificate of merit under W.Va.Code, 55-7B-6 [2003], **the plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies.**
>
> Under ***W.Va.Code, 55-7B-6*** [2003], when a healthcare provider receives a pre-suit notice of claim and screening certificate of merit that the healthcare provider believes to be legally defective or insufficient, the **healthcare provider may reply within thirty days of the receipt of the notice and certificate with a written request to the claimant for a more definite statement of the notice of claim and screening certificate of merit. The request for a more definite statement must identify with particularity each alleged insufficiency or defect in the notice and certificate and all specific details requested by the defendant.**

The Supreme Court went even further in both ***Roy*** and ***Hinchman*** and stated that the failure to respond within 30 days - in writing - to any deficiencies in a notice of claim and Certificate of Merit results in a **WAIVER** of any of those objections (emphasis added):

> Under ***W.Va.Code, 55-7B-6*** [2003], the making of a request for a more definite statement in response to a notice of claim and screening certificate of merit preserves a party's objections to the legal sufficiency of the notice and certificate as to all matters specifically set forth in the request; **all objections to the notice or certificate's legal sufficiency not specifically set forth in the request are waived**. ***Roy, supra,*** at page 9, quoting ***Hinchman***.

Therefore, Vaidya waived any right to object to Westmoreland's Notice of Claim and Statement in Lieu of Certificate of Merit by failing to object to those documents within thirty (30) days of being served with them.

4: THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING DEFENDANT/APPELLEE'S VAIDYA'S MOTION TO DISMISS AND LATER DENYING PLAINTIFF/APPELLANT WESTMORELAND'S MOTION FOR RECONSIDERATION AND FOR RELIEF FROM JUDGMENT UNDER CIVIL RULE 60 BASED ON WESTMORELAND'S ALLEGED FAILURE TO COMPLY WITH THE REQUIREMENTS OF *WV CODE §55-7B-6.*

Westmoreland expressly and completely complied with the pre-suit requirements of the ***MPLA*** by timely filing a **NOTICE OF CLAIM** as well as a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening Certificate of Merit. Further, Westmoreland waited more than thirty (30) days before filing his **COMPLAINT**. Therefore, Westmoreland entirely satisfied the pre-suit requirements of the ***MPLA***.

Nevertheless, the Trial Court chose to grant Vaidya's **MOTION TO DISMISS** because of Westmoreland's alleged failure to comply with the pre-suit requirements of the ***MPLA*** - namely, because of Westmoreland's failure to file a Certificate of Merit.

However, as Westmoreland was *pro se* prior to the Trial Court's grant of Vaidya's **MOTION TO DISMISS**, Westmoreland had failed to inform the Trial Court of the recent case law referred to above. Westmoreland then retained his present Counsel and filed his **MOTION FOR RELIEF**. In that **MOTION**, Westmoreland, by Counsel, specifically referred the Trial Court's attention to this Court's holdings in ***Gray***, ***Hinchman*** and ***Roy***.

The Trial Court ignored this Court's holdings in those cases, denied Westmoreland's **MOTION FOR RELIEF** and affirmed the Trial Court's prior dismissal of all of Westmoreland's claims. The denial of Westmoreland's **MOTION FOR RELIEF** was an abuse of discretion for all of the reasons stated in **ASSIGNMENTS OF ERROR 1 THRU 4**.

5: THE TRIAL COURT ERRED BY IGNORING, NEVER RULING ON AND REFUSING TO GRANT PLAINTIFF/APPELLANT WESTMORELAND'S MOTIONS FOR DEFAULT JUDGMENT FOR APPROXIMATELY 18 MONTHS.

Vaidya's failure to timely file an **ANSWER** should have resulted in a default judgment against him. ***Civil Rule 55(a)*** states,

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

It has already been established in this **BRIEF** that Westmoreland properly and timely served his Notice of Claim and Statement in Lieu of Certificate of Merit - and it has been established that Vaidya did not timely respond. Further, it has been established that Westmoreland properly and timely filed his **COMPLAINT** and that Vaidya did not file an **ANSWER** to the **COMPLAINT**, but rather filed a **MOTION TO DISMISS** on the 20th day after the **COMPLAINT** was filed. Vaidya's **MOTION TO DISMISS** was based entirely on Westmoreland's alleged failure to comply with the ***MPLA*** by failing to serve a Certificate of Merit upon Vaidya.

Presumably, Vaidya is asserting that his **MOTION TO DISMISS** was an attempt to give notice that he had a bona fide defense. However, Vaidya did not at any point file an **ANSWER** to the **COMPLAINT**. ***Civil Rule 12(a)(1)*** states in pertinent part (emphasis added),

> A defendant shall **serve an answer within 20 days** after the service of the summons, **unless** before the expiration of that period the defendant files with the court and **serves on the plaintiff a notice that the defendant has a bona fide defense**, and then an answer **shall be served within 30 days** after the defendant was served. . .

Even if Vaidya's **MOTION TO DISMISS** could be qualified as a notice of bona fide defense, Vaidya was nevertheless required to file an **ANSWER** to the **COMPLAINT** within 30 days of being served. It is undisputed that Vaidya has never filed an **ANSWER** in the case below.

Again, Vaidya's **MOTION TO DISMISS** was based **entirely** on Westmoreland's alleged failure to comply with the ***MPLA***. As previously noted, Vaidya had **waived** any objection to Westmoreland's pre-suit Notice of Claim and Statement in Lieu of Certificate of Merit by failing to respond to those documents within thirty days.

W.V. Code § 55-7B-6(e) states,

> Any health care provider who receives a notice of claim pursuant to the provisions of this section may respond, in writing, to the claimant or his or her counsel within thirty days of receipt of the claim or within thirty days of receipt of the screening certificate of merit if the claimant is proceeding pursuant to the provisions of subsection (d) of this section. **The response may state that the health care provider has a bona fide defense** and the name of the health care provider's counsel, if any.

According to the above statute, Vaidya was required to make his statement of bona fide defense regarding Westmoreland's pre-suit filings within thirty days of receipt of the notice of claim. Vaidya did not do so. Therefore, the only argument Vaidya asserted in his **MOTION TO DISMISS** is moot. See also ***Hinchman v. Gillette, et al.***, 2005 W.Va. (31760); 618 S.E.2d 387 at page 12 of the opinion:

> For **specific objections** to a pre-suit notice and certificate **to be made for the first time only after suit is filed** is contrary to the purposes of the statute -- to avert frivolous claims leading to a lawsuit and to promote the pre-suit resolution of non-frivolous claims.

On July 11, 2005, Westmoreland, *pro se* moved for a default judgment against Vaidya in a document mis-titled **REGARDING SUMMARY JUDGMENT**. Westmoreland renewed that motion on July 18, 2005, August 26, 2005 and February 16, 2006.

The Trial Court ignored Westmoreland's **MOTION FOR DEFAULT JUDGMENT** entirely for 18 months. The Trial Court should have found that Vaidya waived any right to object to Westmoreland's pre-suit filings. Further, the Trial Court erred in ignoring, never ruling on and refusing to grant Westmoreland's **MOTION FOR DEFAULT JUDGMENT**.

6: THE CERTIFICATE OF MERIT REQUIREMENT FOUND IN *WV CODE §55-7B-6(B)* OF THE MEDICAL PROFESSIONAL LIABILITY ACT (*MPLA*) IS UNCONSTITUTIONAL BECAUSE IT RESTRICTS OR DENIES CITIZENS' ACCESS TO THE COURTS BY REQUIRING PLAINTIFFS TO PAY EXORBITANT AMOUNTS OF MONEY IN ORDER TO OBTAIN A CERTIFICATE OF MERIT.

As noted previously, in an effort to avoid any conflict over the ***MPLA***, Westmoreland did attempt to obtain a Certificate of Merit so that he would then be in compliance with two (2) separate sections of ***W.V. Code § 55-7B-6*** - the exception in part ***(c)*** and the Certificate of Merit requirement in part ***(b)***. Two (2) of the twelve (12) urologists Westmoreland contacted **were willing** to sign a Certificate of Merit - but only in exchange for a fee in the amount of $40,000.00.

Defendant/Appellee Vaidya has taken a rather strange position in regards to this exorbitant expense. In Defendant's footnote 2 on page 7 of the **DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND RELIEF**, Vaidya refers to ***Hinchman v. Gillette, supra***, in support of his assertion that an expense of $40,000.00 to obtain a one or two page certificate of merit is a "reasonable expectation" which constitutes "compensating a medical expert for his time." In that footnote, Vaidya even goes so far as to refer to $40,000.00 as a "little money." However, Vaidya failed to mention in his response that the Supreme Court also stated in ***Hinchman*** at page 10 of the opinion that, "The requirement of a pre-suit notice of claim and screening certificate of merit **is not intended to restrict or deny citizens' access to the courts**."

Apparently Vaidya does not live in West Virginia - or perhaps he has forgotten the financial circumstance of the vast majority of his patients. According to the U.S. Census Bureau on the http://www.census.gov website, West Virginia had a per capita income of $16,477 in the 2000 census. The Census Bureau also states that the economic situation in Mason County is even worse with a per capita income of $14,804 (1999). In light of that figure, does the Defendant honestly believe that $40,000.00 is a "little money"?

Perhaps so - it is certainly in the Defendant's interest to believe such things. After all, if Plaintiffs in West Virginia are required to expend more than two and one half (2 ½) years of their pre-tax income in order to even file a suit against Vaidya, it certainly guarantees that there will be very few malpractice suits filed against him. It is beyond doubt that very few Plaintiff's attorneys would take medical malpractice cases on a contingent fee if the attorneys had to front $40,000.00 to even file notice of the suit. The consequences of such a fee would clearly **restrict or deny citizens' access to the courts.** Even a fee 90% lower ($4,000.00) would be highly restrictive of access to the Courts for many citizens of West Virginia.

In two (2) very recent decisions, the Supreme Courts of Oklahoma and Arkansas (citing Oklahoma) found all or part of their versions of the certificate of merit requirement unconstitutional and/or in conflict with the Rules of Civil Procedure.

OKLAHOMA SUPREME COURT FINDS AFFIDAVIT OF MERIT STATUTE UNCONSTITUTIONAL

First, in ***Zeier v. Zimmer, Inc.*** (2006), 2006 OK 98, 152 P.3d 861, the Supreme Court of Oklahoma found their Affidavit/Certificate of Merit statute unconstitutional for the very reasons that have been asserted by Westmoreland. The ***Zeier*** Court covered Westmoreland's assignment of error and argument here so effectively and thoroughly that it is difficult for Appellant's Counsel to improve on or add to the ***Zeier*** Court's reasoning. Therefore, Plaintiff/Appellant Westmoreland asks this Court to thoroughly review the Oklahoma Supreme Court's holding in ***Zeier.*** Coincidentally, in ***Zeier***, the Oklahoma Supreme Court made arguments which are very similar to the arguments made by Chief Justice Davis in her concurrence in ***Hinchman v. Gillette, et al.***, 2005 W.Va. (31760); 618 S.E.2d 387.

The facts of ***Zeier*** involved the Plaintiff/Appellant's medical malpractice suit relating to her knee replacement surgery. The patient neither attached an affidavit of medical negligence, as required

by Oklahoma's Affidavit of Merit statute, nor did she request an extension of time to comply with the statutory requirement.

The physician in ***Zeier*** filed a motion to dismiss for the patient's failure to provide the medical negligence affidavit. The patient responded to the motion to dismiss by asserting that the petition stated a cause of action for negligence under the principle of res ipsa loquitur. Furthermore, the patient argued that the statutory affidavit requirement constituted an unconstitutional special law under the Oklahoma Constitution and that it violated the constitutional guarantee of access to the courts contained in the Oklahoma Constitution and the United States Constitution.

The trial court entered a final order of dismissal without prejudice from which patient ***Zeier*** appealed. It is useful to begin the discussion of ***Zeier*** by comparing the relevant constitutional provisions from West Virginia with the equivalent ones from Oklahoma.

Oklahoma Constitution Art. 5 § 46 provides in pertinent part: "The Legislature shall not except as otherwise provided in this Constitution, pass any local or special law authorizing: . . . Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts . . ."

Similarly, ***W. Va. Const. Art. VI, § 39*** states in pertinent part, "The Legislature shall not pass local or special laws in any of the following enumerated cases; that is to say, for . . . Regulating the practice in courts of justice."

Further, ***Oklahoma Constitution Art. 2, § 6*** provides, "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

Again, similarly, ***W. Va. Const. Art. 3, § 17*** states, "The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

The relevant constitutional provisions in Oklahoma and West Virginia are virtually equivalent. The only question that remains is whether this Court will interpret the relevant statutes in the same manner that the Oklahoma Supreme Court did.

In considering the issues in ***Zeier***, the Oklahoma Supreme Court found that their Affidavit of Merit statute was a "special law" and that the statute created a monetary barrier to access to the Courts of Oklahoma. Concerning the fact that the Affidavit of Merit requirement was a special law, the ***Zeier*** Court stated (emphasis added),

> The affidavit of merit requirement **immediately divides tort victims alleging negligence into two classes** – those who pursue a cause of action in **negligence generally** and **those who name medical professionals** as defendants. . . **Plaintiffs alleging anything other than medical negligence need only file a petition giving fair notice** of the plaintiff's claim and the grounds upon which it rests. These claimants have **no affidavit requirement** and may commence a cause of action with the filing of a petition, while **those alleging medical malpractice must obtain a professional opinion that their cause is meritorious** as a prerequisite to pursuing suit or be subject to dismissal. . .
>
> . . . With the enactment of the affidavit of merit statute, **courts are required to classify three sets of negligence plaintiffs**: 1) **general negligence** plaintiffs -- not required to file an affidavit of merit; 2) **medical malpractice plaintiffs** to which the affidavit requirement. . . applies; and 3) a **third class comprised of medical malpractice plaintiffs** who may not be subject to [the affidavit of merit requirement] because, generally, no professional opinion is required for recovery under res ipsa loquitor.
>
> A statute is a "**special law**" where a **part of an entire class of similarly affected persons is separated for different treatment**. . . . the [affidavit of merit statute] . . . sets aside a subset of negligence plaintiffs for **different procedural and evidentiary treatment based on the type of action they pursue.** The professional **affidavit requirement** . . . **has no counterpart in the general law of tort claims**. . . **only medical malpractice defendants**, not negligence defendants generally, are granted what is a **mandated discovery**

> **privilege** before a petition for recovery will ever be heard . . . This is precisely the vice that the Oklahoma Constitution and this Court have long guarded against -- the **granting of preference to some and the denial of equality to a class**.
>
> **Medical malpractice plaintiffs constitute nothing more than a subset of parties pursuing a cause under negligence standards**. Because [the affidavit of merit statute] impacts **less than an entire class** of similarly situated claimants -- medical malpractice claimants are severed from all tort victims with the possibility of the creation of a third class if the doctrine of res ipsa loquitor applies, **the statute is underinclusive and special**. We determine that **the statute violates the absolute and unequivocal prohibition of the Oklahoma Constitution art. 5, §46** against the passing of **special laws** regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts.

In this case, Plaintiff/Appellant Westmoreland stated that the two (2) physicians who were willing to sign a Certificate of Merit on his behalf required a payment of $40,000.00 before they would sign the Certificate of Merit. The Oklahoma Supreme Court in ***Zeier*** continued to discuss this very issue and stated that the Affidavit of Merit statute in Oklahoma created a monetary barrier to access to the Courts by requiring medical malpractice Plaintiffs and/or their attorneys to pay exorbitant fees for a medical opinion affidavit before filing suit or obtaining discovery (emphasis added):

> . . . **the additional certification costs [of the Affidavit of Merit requirement] have produced a substantial and disproportionate reduction in the number of claims filed by low-income plaintiffs**. The affidavit of merit provisions **front-load litigation costs and result in the creation of cottage industries of firms offering affidavits from physicians for a price**. They also **prevent meritorious medical malpractice actions from being filed**. . . these provisions have **resulted in the dismissal of legitimately injured plaintiffs' claims based solely on procedural**, rather than substantive, **grounds**.
>
> . . . [this has created] a windfall for insurance companies who benefit from the **decreased number of causes they must defend** but which are **not required to implement post-tort reform rates decreasing the cost of medical malpractice insurance to physicians**. These companies **happily pay less out in tort-reform states** while **continuing to collect higher premiums from doctors** and **encouraging the public to blame the victim or attorney for bringing frivolous lawsuits**. . .

> . . . **medical malpractice plaintiffs are singled out and must stand the cost of an expert opinion, which may range from $500 to $5,000, before they may proceed to have their rights adjudicated. In at least one instance, an affidavit of merit cost the litigant *$12,000*.**
>
> A statute that so **conditions one's right to litigate impermissibly denies equal protection and closes the court house doors to those financially incapable of obtaining a pre-petition medical opinion.** Therefore, we determine that **[the affidavit of merit statute] creates an unconstitutional monetary barrier to the access to courts guaranteed by . . . the Oklahoma Constitution.**
>
> . . . the statute necessarily **conditions the medical malpractice plaintiff's right to judicial review on the ability to acquire an expert's opinion at a cost of between $500.00 and $5,000.00. . .**

Finally, the Oklahoma Supreme Court concluded the ***Zeier*** decision with the following discussion (emphasis added):

> A general law encompasses **all of a class.** A special law is one that rests on a **false or deficient classification.** It creates preference and establishes inequity. Art. 5, §46 of the Oklahoma Constitution **absolutely prohibits special laws** . . .
>
> **Only plaintiffs alleging medical malpractice are subject to the statutory requirement** of providing an affidavit of merit upon the filing of a cause. **When a remedy is afforded by general law, it may not be granted to some and capriciously or arbitrarily denied to others.** The impact of the affidavit requirement on those, like the patient here, is invidious. Zeier's cause was dismissed and her access to the trial court's portals denied for failure to obtain a medical expert's opinion which will be inadmissable as evidence at trial . . . [The affidavit of merit statute] is an unconstitutional special law . . .
>
> This Court **does not correct the Legislature**, nor do we take upon ourselves the responsibility of legislating by judicial fiat. However, **we are compelled to apply Oklahoma's Constitution.** It has long been the policy of the Oklahoma Constitution, the statutes and this Court to open the doors of justice to every person without distinction or discrimination for redress of wrongs and reparation for injuries. **Although art. 2, §6 does not promise a remedy for every wrong, it requires that a complainant be given access to court when a wrong suffered is recognized in the law.**
>
> **Treating medical malpractice plaintiffs with rules inapplicable to all other negligence claimants interjects a degree of arbitrariness which sabotages equal access to the courts.** [The affidavit of merit statute] **creates the**

> **potential for a medical expert to usurp the functions of the judiciary and the trier of fact**. The requirement that a medical malpractice claimant obtain a professional's opinion that the cause is meritorious at a cost of between $500.00 and $5,000.00 **creates an unconstitutional monetary barrier to the access to courts guaranteed by . . . the Oklahoma Constitution.**

ARKANSAS SUPREME COURT FINDS AFFIDAVIT OF MERIT STATUTE UNCONSTITUTIONAL AND IN CONFLICT WITH RULES OF CIVIL PROCEDURE

In ***Summerville v. Thrower*** (2007), Opinion No. 06-501, Opinion Delivered 3-15-07, the Arkansas Supreme Court considered the appeal of an obstetrics case involving a failure to diagnose a tubal pregnancy as well as other claims. The Arkansas Affidavit of Merit statute required that an Affidavit of Merit be filed in medical malpractice claims within 30 days after the filing of the complaint.

In ***Summerville***, the Arkansas Supreme Court cited to ***Zeier v. Zimmer, Inc.*** (2006), 2006 OK 98, 152 P.3d 861 and found that the statute was invalid for two (2) reasons: (1) the statute was in conflict with ***Civil Rule 3*** regarding commencement of actions; and (2) unconstitutional based on conflict with the rulemaking provisions of the Arkansas Constitution.

(Note: The Arkansas Supreme Court in ***Weidrick v. Arnold***, 310 Ark. 138, 835 S.W.2d 843 (1992), had already overturned the 60 day notice requirement of the medical malpractice statute based on its conflict with ***Civil Rule 3***.).

Arkansas' ***Civil Rule 3*** states in pertinent part, "A civil action is commenced by filing a complaint with the clerk of the court . . ."

West Virginia's ***Civil Rule 3*** states in pertinent part, "A civil action is commenced by filing a complaint with the court."

Clearly, the Civil Rules concerning commencement of an action in the two (2) states are virtually identical. Thus, the only remaining question is whether or not this Court will apply ***Civil Rule 3*** to the in the same manner as the Arkansas Supreme Court did in ***Summerville***.

The ***Summerville*** Court stated (emphasis added),

> Rule 3 governs the commencement of all civil actions and requires only that a complaint be filed with the clerk of the appropriate court. [In ***Weidrick***] We concluded that the sixty-day-notice requirement added an additional condition for the commencement of a medical-malpractice action, and we struck down this procedural hurdle as being directly at odds with Rule 3.
>
> At the outset, it is important to highlight the fact that the **Medical Malpractice Act currently contemplates two averments by experts:** (1) the **affidavit of reasonable cause, which is the subject of this appeal**; and (2) **expert testimony of the community's standard of care** . . . The [medical malpractice] act specifies no time frame in which the expert testimony must be given . . . [The Affidavit of Merit statute] requires an **additional medical expert averment in the form of an affidavit of reasonable cause within thirty days of filing a complaint and justifies it in the Emergency Clause on the basis that lower medical malpractice insurance costs will follow.**
>
> The **constitutional infirmity** in [the Affidavit of Merit statute] is the provision for dismissal if the affidavit does not accompany a complaint within thirty days. We do not hold today that the balance of [the Affidavit of Merit statute], requiring a reasonable-cause affidavit, is constitutionally infirm. Having said that, **it appears that without the time limit of thirty days, the statute largely is duplicative of [the general statute] regarding the plaintiff's burden of proof and medical expert testimony concerning breach of the standard of care in the community.**

This Court stated in ***Pethel v. McBride***, 2006 W.Va (32784), "To begin, 'under our rule-making authority ... rules promulgated by this Court have the force and effect of law and will supersede procedural statutes that conflict with them.' ***State v. Davis***, 178 W.Va. 87, 90, 357 S.E.2d 769, 772 (1987), overruled on other grounds, State ex rel. ***R.L. v. Bedell***, 192 W.Va. 435, 452 S.E.2d 893 (1994)). See ***W. Va. Const. Art. VIII, § 3*** ('The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law.')."

Upon consideration of all of the above, it is clear that ***W.V. Code § 55-7B-6(b)*** is a procedural statute which is not only in conflict with the ***West Virginia Constitution***, but is also in conflict with various portions of the rule making authority of this Court and in direct conflict with the ***West Virginia***

Rules of Civil Procedure. Therefore, this Court should find ***W. V. Code § 55-7B-6(b)*** and the Court should strike that portion of the statute for all of the above reasons.

CONCLUSION OF ASSIGNMENT OF ERROR NO. 6

Medical malpractice Plaintiffs (with very narrow exceptions like *res ipsa loquitur* cases) in Oklahoma, Arkansas and West Virginia are required to present expert medical testimony in medical malpractice cases after the complaint is filed. If the Plaintiffs in all three (3) of the states fail to present said expert medical testimony, those Plaintiffs will lose their cases upon Motion for Summary Judgment filed by the Defendant.

Further, before any statutes protecting doctors from suit were ever passed, attorneys and Plaintiffs in all three (3) states were already required to abstain from filing frivolous claims by the ***Civil Rules*** of those states. As the ***Zeier*** Court eloquently stated (emphasis added),

> Not only does the **requirement for providing an affidavit of merit** in medical malpractice causes create a needless burden, **it is redundant**. With each filing . . . attorneys and pro se parties certify that, **to the best of the person's knowledge, information, and belief**, formed after a reasonable inquiry, that the cause is: **not presented for an improper or frivolous purpose**; the **claims** . . . **are warranted by existing law or by a nonfrivolous argument for the law's extension, modification or reversal of established law; factual assertions have or are likely to have evidentiary support**. . .

Therefore, this Court should reverse the Certificate of Merit requirement found in ***W. V. Code § 55-7B-6*** for the following reasons:

1: The Certificate of Merit requirement is a special law in violation of ***W. V. Constitution 6-39*** because it makes a specific, small group of negligence Plaintiffs into a special class and imposes different requirements on those Plaintiffs than on other Plaintiffs pleading negligence;

2: The Certificate of Merit requirement creates a monetary barrier to access to the Courts of West Virginia in violation of ***W. V. Constitution 3-17*** by requiring medical malpractice Plaintiffs to expend large sums of money on expert opinions before the complaint is even filed;

3: The Certificate of Merit requirement violates the rule making powers of the Supreme Court of West Virginia and the separation of powers provisions found in the ***W.V. Constitution*** and the ***W.V. Civil Rules***.

4: The Certificate of Merit requirement is duplicative and redundant because medical malpractice Plaintiffs were already required to submit expert medical testimony prior to the enactment of ***W.V. Code § 55-7B-6***. Plaintiffs should not be required to submit such evidence and testimony at least until discovery has commenced - as is required by the rules applicable to all other cases in this state.

In the alternative, should this Court reverse the dismissal of the Trial Court but also find that a Certificate of Merit is required, Westmoreland is willing to file his own Certificate of Merit - and he is properly qualified as an expert under ***Evidence Rule 702*** to do so.

Regardless, under the circumstances that existed at the time of Westmoreland's service of the **NOTICE OF CLAIM** - and under Westmoreland's *pro se* understanding of the law at that time - it is undisputed that it would have cost Westmoreland $40,000.00 to obtain a Certificate of Merit to serve upon Vaidya. Such an expense undoubtedly restricts or denies citizens' access to the court and violates the right to a trial by jury. Therefore, the Certificate of Merit requirement is unconstitutional and should be declared so by this Court.

7: THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF/APPELLANT WESTMORELAND'S CLAIM THAT DEFENDANT/APPELLEE VAIDYA COMMITTED A CIVIL BATTERY UPON WESTMORELAND WHICH WAS NOT GOVERNED BY THE *MPLA*. VAIDYA COMMITTED THAT BATTERY BY CONTINUING A MEDICAL PROCEDURE AFTER WESTMORELAND HAD WITHDRAWN HIS CONSENT TO THAT PROCEDURE.

This assignment of error appears to be an **issue of first impression** for this Court. Westmoreland has repeatedly argued in this case that "No means no" and that the continuation of the medical procedure by Vaidya after Westmoreland withdrew his consent to the procedure was a battery claim rather than a malpractice claim. Black's Law Dictionary defines civil battery as "An intentional and offensive touching of another without lawful justification."

In ***Boggs v. Camden-Clark Memorial Hospital*** (2004), 216 W.Va. 656; 609 S.E.2d 917 this Court recently referred to civil battery in the context of a medical malpractice case. In ***Boggs***, this Court stated at pages 10 and 11 of the opinion (emphasis added),

> **Fraud**, spoliation of evidence, or negligent hiring are **no more related** to "**medical professional liability**" or "health care services" than **battery**, larceny, or **libel**. There is simply **no way to apply the MPLA to such claims.**
>
> If for some reason a **doctor** or nurse **intentionally assaulted** a patient, stole their possessions, or **defamed** them, such actions would not require application of the MPLA any more than if the doctor or nurse committed such acts outside of the health care context. Moreover, **application of the MPLA to non-medical malpractice claims would be a logistical impossibility**...
>
> Thus we find that the **lower court erred in dismissing the appellant's causes of actions** that were only contemporaneous or related to the alleged act of medical professional liability. . .
>
> . . . [the MPLA] does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.

While Westmoreland filed a medical malpractice claim (along with several other claims), Westmoreland initially objected to the cystoscopy because Vaidya wanted to perform the procedure on Westmoreland without anesthesia. Vaidya insisted on performing the procedure anyway. Then, mere seconds after the procedure began, Westmoreland withdrew his consent. The continuation of that medical procedure by Vaidya was a battery which exists outside the scope of medical malpractice. At the precise moment of withdrawal of consent, any and all medical procedures should have been terminated. Regardless of whether the continuation of the medical procedure after the withdrawal of consent was conducted according to generally accepted medical standards or not, any continuation of the medical procedure was a battery upon Westmoreland's person. After Westmoreland withdrew his consent, even if the procedure had been performed perfectly by Vaidya, the withdrawal of consent by Westmoreland made Vaidya's acts after the withdrawal of consent a civil battery.

A Physician can only perform the procedure that has been consented to and may not extend the procedure without obtaining a further consent from the Patient. If a Physician were to grab an individual off the street and force a medical procedure upon the patient without the patient's consent, it is beyond doubt that such action would result in a battery claim and not in a medical malpractice claim - even if that individual needed the procedure. Is there really any substantive difference if the Patient withdraws his consent to a medical procedure previously consented to?

It appears that the West Virginia Supreme Court has not yet considered the issue of the withdrawal of consent to a medical procedure after the procedure had begun. However, several other jurisdictions have considered such an issue and those jurisdictions support various portions of Westmoreland's claims. Below, Westmoreland presents an overview of the cases in those jurisdictions.

VIRGINIA (CITING GEORGIA)

On at least three (3) occasions the Supreme Court of Virginia has considered the issues of withdrawal of consent and battery in the course of medical treatment. That Court's holding cited a noteworthy case from Georgia and the holdings of both the Virginia and Georgia cases were in Westmoreland's favor.

In ***Pugsley v. Privette***, 220 Va. 892, 263 S.E.2d 69 (1980), an ob/gyn case, at page 74, the Virginia Supreme Court referred to the case from Georgia and held that (emphasis added):

> This case is controlled by those most elementary principles of law which govern an action for assault and battery. . . a surgical operation on the body of a person is a technical battery or trespass unless he or some authorized person consented to it. . .
>
> . . . **consent to an operation may also be withdrawn**, if timely and unequivocally done, **thereby subjecting the surgeon to liability for battery if the operation is continued**. See ***Mims v. Boland***, 110 Ga.App. 477. . .
>
> (page 75). . . It was Mrs. Privette's body on which the operation was to be performed and **the decision was one peculiarly for her to make**. . .

> Had Mrs. Privette's recovery been an uneventful one, the action would most likely have not been brought. But the recovery was anything but uneventful, and this was the risk the defendant took when he operated without consent.

In the back surgery case, ***Washburn v. Klara***, 263 Va. 586, 590, 561 S.E.2d 682, 685 (2002), Plaintiff Washburn initially filed a variety of claims, including, but not limited to medical malpractice and battery. During the trial, Plaintiff Washburn **voluntarily dismissed her claim of medical malpractice** and **presented evidence to the jury only regarding the remaining counts, including battery arising from the medical procedure.** Plaintiff's theory was that she had withdrawn her consent to the procedure and that, therefore, the surgery the Defendant performed upon the Plaintiff constituted a battery upon the Plaintiff's person.

In ***Washburn***, the Supreme Court of Virginia considered only the issue of whether or not the lower Court should have struck the Plaintiff's evidence regarding battery and reversed the lower Court's holding, cited ***Pugsley***, *supra*, and stated (emphasis added),

> . . . we find that the circuit Court erred by striking Washburn's evidence with regard to the claim of battery. . . in ***Woodbury v. Courtney***, 239 Va. 651, 391 S.E.2d 293 (1990) . . . With respect to the claim of battery, we held that the trial court erred in granting summary judgment in favor of the defendant surgeon, because the **Plaintiff was not required to present expert medical testimony in order to prove her allegations of battery**. We concluded that "a factual issue was created and the jury should have been allowed to determine the extent of the permission [the patient] granted to [the surgeon] and whether he exceeded the scope of that permission. If [the surgeon] exceeded the scope of that permission, then he committed a battery." Id. at 654, 391 S.E.2d at 295 (citing ***Pugsley***, 220 Va. at 899, 263 S.E.2d 74).

The Virginia Supreme Court held that the Plaintiff should be permitted to maintain her battery action against the doctor - **without a medical malpractice claim AND without expert medical testimony.**

KENTUCKY (CITING GEORGIA)

Kentucky has considered a similar issue on at least two (2) occasions and based its holdings on the same ***Mims*** case from Georgia which was referred to by the Virginia Supreme Court in ***Pugsley, supra***. In ***Coulter v. Thomas***, 33 S.W.3d 522 (2000), the Supreme Court of Kentucky heard the following appeal. The Plaintiff was to undergo a surgical procedure to remove a cyst on her eyelid. A nurse placed an automatic blood pressure cuff (ABPC) on the Plaintiff's arm which automatically inflated and deflated. The surgery then began.

The Plaintiff repeatedly complained of severe pain and demanded that the cuff be removed. Not until the ABPC had inflated for a third time did the Defendant remove the cuff as demanded by the Plaintiff - ostensibly because in the Defendant's opinion the Plaintiff was "a complainer". The nerves and blood vessels in the Plaintiff's arm were severely damaged.

In the Trial Court, the Plaintiff claimed that the damage was a battery because she expressly withdrew her consent to the ABPC portion of the procedure. The Trial Court refused to give an instruction on battery and the jury returned a verdict for the Defendant.

In ***Coulter***, the Kentucky Supreme Court reversed the decision of the Trial Court and remanded the case for a trial on the battery issue. The ***Coulter*** Court stated at page 524 (emphasis added),

> In ***Mims v. Boland***, 110 Ga. App. 477, 138 S.E.2d 902 (1964), the Plaintiff claimed she revoked her consent to a barium enema which was administered despite her revocation. In reaching its conclusions, the Court of Appeals of Georgia delineated a test which we adopt:
>
> To constitute an **effective withdrawal of consent** as a matter of law after treatment or examination is in progress commensurate to subject medical practitioners to liability for assault and battery if treatment or examination is continued, two essential elements are required: (1) The patient must act or use language which can be subject to no other inference and which must be unquestioned responses from a clear and rational mind. These actions and utterances of the patient must be such as to leave no room for doubt in the minds of reasonable men that in view of all the circumstances consent was actually withdrawn. (2) When medical treatments or examinations occurring

> with the patient's consent are proceeding in a manner requiring bodily contact by the physician with the patient and consent is revoked, it must be medically feasible for the doctor to desist in the treatment or examination at that point without the cessation being detrimental to the patient's health or life from a medical viewpoint.

The ***Coulter*** Court determined that the jury could find from the evidence presented that Coulter revoked her consent to the use of the blood pressure cuff. The Court stated at page 524 (emphasis added),

> First, she testified that **she used very specific language in demanding that the cuff be removed.** She claims that she stated, "Take it off. I can't stand it," after the first inflation. Dr. Thomas testified that she merely complained of the tightness of the cuff. Regardless, it is up to the jury to decide whom to believe. If they choose to believe Appellant, language such as "take it off" could satisfy the first prong of the test. . .
>
> . . . we hold that, on remand, the **jury** should be allowed to determine if Appellant's consent was effectively revoked.
>
> The trial court also erred in not allowing the tendered battery instruction to the jury. . . As stated above, this is a case about revocation of consent, and therefore, pursuant to our recent decision in ***Vitale***, **it is proper for Appellant to bring a claim for battery**.

In ***Vitale v. Henchey***, 24 S.W.3d 651, 653 (2000), the Supreme Court of Kentucky stated,

> Because surgery **performed without the patient's consent** gives rise to an action for the intentional tort of battery, and the **accepted standard of medical care is not implicated by such a claim,** we hold that such proof is not required.

Interestingly, the ***Vitale*** Court cited no less an authority than Justice Benjamin Cardozo as the basis for it's holding that a claim based on lack of consent or withdrawal of consent is not a medical malpractice action. The ***Vitale*** Court continued at page 656 (emphasis added, footnotes removed),

> . . . we adopted the rule of law stated by Justice Cardozo in ***Schloendorff v. Society of New York Hospital***:
>
> > In the case at hand, the wrong complained of is not merely negligence. It is trespass. Every human being of adult years and sound mind has a right to determine what shall be done

> with his own body; and **a surgeon who performs an operation without his patient's consent commits an assault**, for which he is liable in damages. . .
>
> **Such an action is different from a negligence action for medical malpractice because the claim depends on neither professional judgment nor the physician's surgical skill.** It also does not involve the type of negligence that occurs when a physician has not made a proper disclosure of the risks inherent in a treatment or procedure. **Battery is an intentional tort; it is not committed by a negligent act**. . .
>
> Neither ***Holton*** nor the ***Kentucky Informed Consent Statute*** transformed a battery claim against a physician who operates without a patient's consent into a negligence action; it remains an action for battery.

See also ***Andrew v. Begley***, 2006 S.W.3d (2005-CA-000273-MR) (emphasis added), ". . . the claim of battery may arise in addition to a claim for medical malpractice. . . An action for battery "**is different from a negligence action for medical malpractice because the claim depends on neither professional judgment nor the physician's surgical skill**."

See also ***Hoofnel v. Segal***, 2003-CA-000412-MR (2003 Kentucky Court of Appeals) at FN 18 (emphasis added), "**Expert testimony is therefore not required when pursuing a battery claim.**"

ILLINOIS

Two Illinois Appellate Courts have considered the issue of whether or not a battery claim against a doctor can be maintained separate from a claim for medical malpractice. In ***Grant v. Petroff***, 5-96-0396 (Illinois Fifth District Court of Appeals, 1997), the Plaintiff brought both medical malpractice and battery claims as the result of the doctor performing a tubal ligation without the Plaintiff's consent. The ***Grant*** Court cited ***Cohen v. Smith***, 269 Ill. App.3d 1087, 648 N.E.2d 329 (1995), and stated (emphasis added, page numbers not available in Appellant's online version),

> Basically, the trial court ruled that the definition of malpractice is broad and encompasses the alleged battery here. **Plaintiff argues that the battery stands independent of plaintiff's allegation of healing art malpractice** . . .

> **Whether Dr. Petroff performed the tubal ligation correctly is irrelevant to count V because plaintiff alleges that Petroff had no authority to perform it in the first place.**
>
> The allegations constituting a cause of action for battery stem from an unconsented-to touching. **Just because plaintiff has a separate malpractice claim where nonconsent was an issue does not mean that an independent claim for battery should be precluded.**

WISCONSIN

The Supreme Court of Wisconsin considered a case similar to Westmoreland's - ***Schreiber v. Physician's Insurance Company of Wisconsin*** (1999), 217 Wis.2d 94; 579 N.W.2d 730. ***Schreiber*** involved the birth of a child. The Plaintiff had previously delivered two (2) children by caesarean section ("C-section"), but chose to have the third baby delivered vaginally based on her physician's recommendation. However, on at least three (3) occasions, the Plaintiff clearly stated that she had changed her mind and wanted to have a C-section. The doctor refused to comply with the woman's wishes in spite of her repeated requests and repeated complaints of severe pains which were not similar to the pain she experienced in the prior births of her children.

Finally, the child's heart rate dropped and the doctor performed an emergency C-section shortly thereafter. Regarding that time period, the ***Schreiber*** Court stated at paragraph 9,

> It was too late. Janice's uterus had ruptured depriving Kimberly of oxygen. Kimberly was born a spastic quadriplegic and she cannot move below her neck or speak. The parties have stipulated that had Kimberly been delivered prior to 3:29 p.m. she would have been born a healthy child.

The ***Schreiber*** Court also discussed the issue of withdrawal of consent in the midst of a medical procedure (from paragraphs 21-25, emphasis added):

> There is little doubt that consent, once given, **is not categorically immutable.** See ***Mack v. Mack***, 618 A.2d 744 (Md. 1993) ("a corollary to [informed consent] is the patient's right, in general, to refuse treatment and **to withdraw consent to treatment once begun**")...

> Even [Dr.] Figge recognized that Janice no longer desired to continue with the VBAC. He testified that he would have done the caesarean section had Janice persisted. **We are unsure, after three unsuccessful personal attempts and a fourth unsuccessful attempt through the nurse, how much more Janice could have done to convince Figge. . .**
>
> The **Schreibers contend that her withdrawal [of consent] both removed [Dr.] Figge's authority to continue with the VBAC and obligated him to conduct another informed consent discussion. We agree. . .**

From the above overview of cases from other jurisdictions it becomes clear that several other Courts would permit Westmoreland to file an independent battery claim against Vaidya and that such a battery claim is not governed by medical malpractice laws. Therefore, the Trial Court erred in dismissing Westmoreland's claim for civil battery.

8: THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF/APPELLANT WESTMORELAND'S CLAIMS FOR FRAUD AND SLANDER BECAUSE SUCH CLAIMS ARE NOT GOVERNED BY THE *MPLA*

Westmoreland filed claims against Dr. Vaidya for fraud and slander - neither of which are even vaguely related to the ***MPLA***. The Trial Court summarily dismissed all of Westmoreland's claims - including the claims for fraud and slander. Vaidya has alleged that the statute of limitations has run on Westmoreland's slander claim, and therefore, that claim is moot. There are two (2) problems with Vaidya's argument. First, the statute of limitations on the slander claim had not run since the slander occurred in February 2005 and the **COMPLAINT** was filed on June 10, 2005. Further, the Trial Court did not address either the slander claim or the fraud claim in the Trial Court's **ORDER** of dismissal. The Trial Court's **ORDER** stated, "Therefore the Court has determined, after extensive review of the record and the Plaintiff's claims, that this case is controlled by the "***MPLA***". . . Because Plaintiff has failed to meet the pre-filing requirements in this action, the case must, as a matter of law, be dismissed."

Westmoreland again refers to this Court's holding in ***Boggs, supra***, as quoted above:

> **Fraud**, spoliation of evidence, or negligent hiring are **no more related** to "**medical professional liability**" or "health care services" than **battery**, larceny, or **libel**. There is simply **no way to apply the MPLA to such claims.**

Therefore, the Trial Court erred in dismissing Westmoreland's claims of slander and fraud because they are not related to the ***MPLA.***

9: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT *PRO SE* PLAINTIFF/APPELLANT WESTMORELAND ACTED IN BAD FAITH IN HIS RELIANCE UPON THE EXCEPTION FOUND IN *WV CODE §55-7B-6(C)* OF THE *MPLA*.

In denying Westmoreland's **MOTION FOR RECONSIDERATION AND FOR RELIEF FROM JUDGMENT UNDER CIVIL RULE 60**, the Trial Court apparently signed and entered the **ORDER** prepared by Vaidya's Counsel as submitted. In that **ORDER** the Trial Court stated that the "Plaintiff failed to show good faith and a reasonable basis for noncompliance."

However, the Trial Judge stated at a prior hearing that Westmoreland had discovered an exception to the Certificate of Merit requirement and that Westmoreland was relying on that exception in good faith. It is strange that the Court would take contradictory positions on Westmoreland's argument in a relatively short period.

Further, the Trial Court erred more egregiously in stating in the same **ORDER** (emphasis added):

> Plaintiff knew of the Certificate of Merit requirement when he filed his claim and **he was reminded of noncompliance when Dr. Vaidya filed his Motion to Dismiss** of June 30, 2005. This means that **for the past 18 months Plaintiff has neglected to address these deficiencies.**

The two (2) problems with the Trial Court's **ORDER** are emphasized above.

First, the Court holds Westmoreland accountable for being reminded of his non-compliance by Vaidya's filing of the **MOTION TO DISMISS**. However, as discussed earlier in this **PETITION**, this Court held in ***Roy v. D'Amato, supra*** (page 8 of opinion) that:

> . . . **any objections to a pre-suit notice and screening certificate should be made prior to the filing of the complaint so that the plaintiff may have the opportunity to correct the alleged defects and insufficiencies. . .**
>
> . . . when a healthcare provider receives a pre-suit notice of claim and screening certificate of merit that the healthcare provider believes to be legally defective or insufficient, the **healthcare provider may reply within thirty days of the receipt of the notice and certificate with a written request to the claimant for a more definite statement of the notice of claim and screening certificate of merit. The request for a more definite statement must identify with particularity each alleged insufficiency or defect in the notice and certificate and all specific details requested by the defendant.**

Further, in ***Hinchman v. Gillette, supra***, (opinion p. 12) this Court held (emphasis added),

> For **specific objections** to a pre-suit notice and certificate **to be made for the first time only after suit is filed** is contrary to the purposes of the statute -- to avert frivolous claims leading to a lawsuit and to promote the pre-suit resolution of non-frivolous claims.

It is undisputed that Vaidya did not respond within 30 days in writing in any way to the alleged deficiencies, insufficiencies or defects in Westmoreland's pre-suit filings. Therefore, as previously discussed, Vaidya did not comply with the ***MPLA*** and this Court's holdings in ***Hinchman v. Gillette, supra*** and ***Roy v. D'Amato, supra***. By his failure to comply with the ***MPLA***, Vaidya waived any objection to Westmoreland's pre-suit filings.

Second, the Trial Court also holds Westmoreland accountable for failing to file a Certificate of Merit in the 18 months since the **MOTION TO DISMISS** was filed. This, also, is an error by the Trial Court. As this Court stated in ***Gray v. Mena, supra*** (page 10 of opinion, emphasis added),

> . . . Appellant therefore filed her civil action without adherence to West Virginia Code § 55-7B-6. In this situation, the defendants should be permitted to request compliance with the statutory requirements. The **lower court should thereafter examine the issues raised by the defendants** and **require the Appellant to comply with the statute**. The statute of limitations for bringing an action under West Virginia Code § 55-7B-6 should be tolled during this court assessment, and the **Appellant should be provided with an additional thirty days after the court decision** to comply with the provisions of the statute.

The Trial Court has erred because its **ORDER** states that Westmoreland was required to remedy an alleged deficiency in his pre-suit filings **prior to any ruling from the Trial Court** that Westmoreland's pre-suit filings were deficient. Until the Trial Court had actually ruled that Westmoreland had not complied with the requirements of the ***MPLA***, Westmoreland was under no obligation to comply.

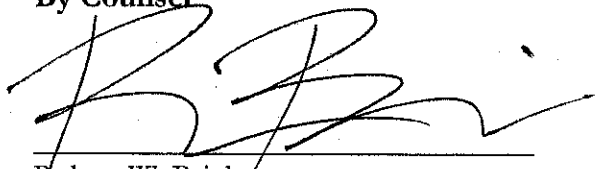
There is no evidence that Westmoreland acted in bad faith in his reliance on the exception found in ***W.V. Code § 55-7B-6(c)***, and it was error for the Court to find that he did. Therefore, any reference to lack of good faith or bad faith on Westmoreland's part should be stricken from the Trial Court's record. Further, there is uncontroverted evidence that Vaidya did not fulfill his responsibilities under the requirements of the ***MPLA*** and this Court's ruling on this **APPEAL** should reflect that fact.

CONCLUSION

For all of the above reasons, the Plaintiff/Appellant Danny Westmoreland PRAYS that the Supreme Court of Appeals of West Virginia consider this **APPEAL BRIEF OF PLAINTIFF/APPELLANT DANNY RAY WESTMORELAND**, and reverse the decision of the Trial Court on one or all of the above assignments of error.

Danny Ray Westmoreland

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DR. DANNY RAY WESTMORELAND

PLAINTIFF,

VS.

SHRIKANT K. VAIDYA, M.D.

DEFENDANT,

COURT OF APPEALS NO. 33459

APPEAL FROM MASON COUNTY
CIVIL ACTION NO. 05-C-97

MASON COUNTY CIRCUIT COURT
JUDGE TOD J. KAUFMAN

CERTIFICATE OF SERVICE

I, Robert W. Bright, as counsel for Dr. Danny Ray Westmoreland, hereby certify that the following documents:

1: **APPEAL BRIEF OF PLAINTIFF/APPELLANT DANNY RAY WESTMORELAND**

was served upon the following persons by depositing a true and accurate copy thereof in the regular United States Mail, first class postage pre-paid, addressed to their last known addresses as follows on the 5th day of July, 2007.

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